REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 94 OF 2019

SKK .....APPELLLANT

VERSUS

REPUBLIC .....RESPONDNET

JUDGMENT

1. The appellant **SKK** was charged with the offence of incest by male in violation of section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on the 4th day of November, 2016 at about 1500hrs at Ngechek sub-location within Nandi county, caused his penis to penetrate the anus of AJ* a girl aged ten years' old who is to his knowledge his daughter.

2. He was charged in the alternative with the offence of committing an indecent act with a child contrary to Section **11(1) of the Sexual Offences Act No. 3 of 2006.** The particulars of the offence are that on the 4th day of November, 2016 at about 1500hrs **at Ngechek** sub-location within **Nandi County,** intentionally caused his penis to come into contact with the anus of AJ a girl aged ten years old who was to his knowledge his daughter.

The appellant denied the charge and after trial in which 5 witnesses testified, and the appellant was the only defence witness, he was convicted on main and sentenced to serve life imprisonment.

3. The evidence presented at the trial was by 11-year-old AJ who identified the appellant as her father who she said did bad manners to her. It was her evidence that on the material date, her mother and sister D were at the shamba, and she was alone at home washing the utensils, when the appellant called her and told to go into the house. Once inside the house she stated that the appellant then removed his 'thing' and put it into her anus. That it was not the first time the appellant had done this. She informed PW2 (her mother) about what had transpired.

4. PW2 (PJ), the mother to AJ testified that on the material day, she had left her children with the appellant, whom she identified as her husband and father to PW l. When she came back, she found the AJ wiping her vagina with leaves. The complainant told her that she had been defiled by the appellant. PW 2 also told the court that her children used to complain that the appellant used to do bad manners to them. When she raised an alarm, the appellant begun chasing her while armed with a panga.

5. The child was taken for medical attention and **DANIEL GICHANG**I (pw3) a clinical officer at Kapsabet hospital who examined her found that the anus was extremely painful, traumatized, swollen and reddish. He concluded that AJ had been sodomised.

According to **ERIC KIBET (PW4)**, also a clinical officer laboratory tests did not reveal any alarming results from tests carried out on the appellant, but he too noted laceration and pain in the anal area of AJ.

6. In his defence, the appellant described events of 8/11/2016 at 4.00pm when he had gone to the bar to drink, and at 9.00pm, the chief arrived and he was arrested. He stated that he had a misunderstanding with his wife (PW2) whom he had caught red handed having a love affair.

7. The trial court upon considering the evidence noted that the relationship of father/daughter was not in dispute, as the accused also confirmed that AJ* was his daughter. The court wondered why a misunderstanding with his wife would result in claims of wrong doing by his daughter. It was noted that the claim of anal sex was confirmed by the medical personnel who examined the complainant, so it could not be that AJ was lying about her encounter. The appellant's defence was rejected as a sham.

8. Being aggrieved by the outcome, the appellant challenged the decision on grounds that:

a) The trial court failed to comply with the provisions of section 200(3) of the Criminal Procedure Code, in that the trial commenced on 24th April 2017 before **E.A, Obina (SM),** then on 13th November 2017 **D. Alego (SPM)** took over and proceeded with the trial and eventually wrote the judgment. It is argued that although the record shows that the court complied with section 200(3) of the

Criminal Procedure Code and the appellant is recorded as having expressed a desire to proceed from where the matter had reached, the court ought to have told the appellant that he had the right to request for recall of PW1 and PW2. Further that the court did not record the language that was being used at the trial.

It is also contended that the trial court ought to have suo motu ordered for de novo hearing as it was critical to observe the demeanour of the witnesses. In support of this argument, reference is made to the case of **NDEGWA V REPUBLIC (1985) KLR 534**

b) It is also pointed out that the court did not conduct voire dire examination, so the evidence of PW1 was taken irregularly- reference is made to the decision in **MATOVU V REPUBLIC (1961) E.A. 260 and KINYUA V REPUBLIC [2002] 1 KLR 256**

The appellant also faulted the evidence by PW1, saying she was not specific regarding the date of the incident, which made it difficult to prove that the evidence placed the appellant at the scene.

c) That the medical results absolved the appellant as nothing alarming was found from the laboratory analysis conducted on him, and that the medical evidence did not prove penetration

d) The court is also urged to find that the prosecution ought to have called DAISY who was mentioned, and that the failure to call her should lead to an adverse inference being drawn against the prosecution. In support of this submission, reference is made to the decision on **BUKENYA V UGANDA (1972) EA 549**

9. On account of the foregoing, this court is urged to find that the case is not even suitable for re-trial, and the appeal should be allowed.

B) NON-COMPLIANCE WITH SECTION 200(3) OF THE CRIMINAL PROCEDURE CODE

The appellant argues that section 200**(3) of the Criminal Procedure Code** was not complied with. He matters was initially heard by Honourable E. A. Obina Senior Resident Magistrate who took the evidence of PWI and PW2. On 12" October, 2017 Honourable D. Alego Senior Principal Magistrate took over the matter and on 13th November, 2017 complied with section 200(3) of the Criminal Procedure Code. The proceedings of that day (as captured in page 15 of the typed proceedings) indicate that the appellant stated that he wanted the matter to proceed from where it had reached. The trial magistrate indicated that section 200 of the Criminal Procedure Code was explained to the appellant and ordered that the matter proceeds from where it had reached. The court did not set out in verbatim what was explained to the appellant in detail but the response by the appellant indicated that the provision was explained.

Therefore, the assertion that the trial magistrate failed to explain to the appellant his rights under **section 200(3) of the Criminal Procedure Code** does not in this instance hold much water and was not fatal to the prosecution case

C) NON-COMPLIANCE WITH SECTIONS 210 AND SECTION 211 OF THE CRIMINAL PROCEDURE CODE

He further argues that the trial magistrate did not comply with **Section 211 of the Criminal Procedure Code**. He states that the trial magistrate did not explain the substance of the charge; he was not informed that he had a right to give evidence on oath from the witness box, and that if he did so he would be liable to cross-examination or to make a statement not on oath from the dock. He further alleges that the trial magistrate did not ask him if he had any witnesses to call or other evidence to adduce in his defines. The appellant states that failure to comply was fatal to the conviction as the appellant never understood the charge against him while testifying.

The court record shows that when the appellant was arraigned in court on 14" November, 2016 for plea taking, charges were read over to him and a plea of not guilty was entered. The language of interpretation was recorded as Kiswahili, which was his language of choice even at the hearing of the appeal.

He was therefore well aware of the charges facing him during the duration of the trial. The prosecution closed its case on 3rd April, 2018 and ruling on a case to answer was delivered on 27th April, 2018. The trial magistrate put the appellant on his defines to comply with section 211 of the Criminal Procedure Code. Once again, the trial magistrate did not set out in verbatim what was explained to the appellant in detail but the response by the appellant indicates that the provision was explained. At page 23 of the typed proceedings, the appellant told the court that he would give unsworn evidence and call two witnesses- would that just have been a bolt out of the blue without any prompting? Surely not. The r ecord shows that the appellant responded appropriately after the explanation given and this was a clear indication that he understood what was required of him.

The appellant was able to give a proper defence, on 7th November, 2018 and applied for witness summons to his two witnesses.

When the matter came up for further defence hearing on 21st November, 2018, the appellant closed his case as his witnesses did not show up do not detect any error by the trial magistrate.

D) FAILURE TO CONDUCT VOIR DIRE EXAMINATION

The appellant has argued in his submissions that the trial court erred in convicting him on the basis of the evidence of a minor which was taken irregularly without due consideration being accorded to the requirement to conduct a void dire examination. It is true from the evidence on record that the complainant gave unsworn evidence without void dire examination being done. The question then is whether failure to conduct the void dire examination was fatal to the prosecution case.

10. The Court of Appeal sitting in Mombasa was faced with the same question in **Maripett Loonkomok v Republic (2016) eKLR** and it stated as follows:

> ***"It is firmly settled that not in all cases that void dire is not administered or is not administered properly the entire trial would be vitiated the question will depend on the peculiar circumstances and particular facts of each case."***

11. The court further quoted its decision in **Athumani Ali Mwinyi vs R Cr. Appeal No. 11 of 2015** which held that:

> ***"In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge..... the court may still be able to uphold the conviction."***

12. Looking at the circumstances in this case, the complainant's evidence was cogent, and the appellant was given an opportunity to cross-examine the complainant and he did so. The medical evidence also confirmed that there was penetration.

13. In light of the foregoing, it is argued that the prosecution discharged its burden of proof and that the appellant was properly convicted of the offence of incest. The evidence by the prosecution witnesses was credible, consistent, reliable and well corroborated. Further, that ingredients of the offence were established beyond reasonable doubt. The appellant was not prejudiced at all during the trial.

14. In opposing the appeal, Miss Okok on behalf of the DPP submits that all the ingredients of the offence of incest were met, and PW1's evidence was well corroborated by PW3 and PW4 who are both clinical officers who attended to her. It is pointed out that the evidence of PW3 was that the complainant presented with a history of being sodomised by her father and that this was the second time she had been defiled. On examination, her anus was extremely painful. It was traumatic, swollen and reddish and there were no tears.

This court is urged to find that the medical evidence supported the evidence that the minor had been defiled through the anus.

15. Indeed, it was conclusively proved that the complainant was a minor. The complainant herself told the court that she was 1l years old at the time of giving her evidence. PW2 confirmed that her daughter (P) was 10 years old at the time of the incident. The birth immunisation card was produced as prosecution exhibit 1. It showed that the complainant was born on 12th April, 2006 and was therefore 10 years old at the time of the incident.

16. As regards defilement PW4 who was the first medical officer to attend to the complainant confirmed what the minor had stated, about anal defilement. He stated that she complained of laceration and pain in the anal area. He referred PW l to Kapsabet Referral Hospital since the laboratory was not working. He produced the treatment documents as prosecution exhibit 4. I concur with the prosecution that the evidence of penetration was solid.

17. The appellant gave a sworn defence where he acknowledged that she is his daughter and was 10 years old at the time of the alleged incident. He however denied defiling her. He claimed that he had a misunderstanding with the complainant's mother, a claim that PW2 vehemently denied during cross-examination.

It is significant to note that the appellant never suggested to his wife (PW2), the source of their disagreement, and claims of being caught red handed in a love affair web were an after-thought only raised in his defence. I am in agreement with the prosecution that his defence was in essence a mere denial and not strong enough to rebut the prosecution case. The trial magistrate did not err in rejecting the defence. I hold and find that the conviction was safe and I uphold it.

SENTENCE

18. The Appellant was sentenced to life imprisonment on 23rd May, 2019. He was given a chance to mitigate and he was not remorseful. The prosecution informed the court that the appellant was a first offender. The life imprisonment imposed on the appellant is the maximum sentence provided for in the **Sexual Offences Act No. 3 of 2006.** In the instant case, the minor complainant was ten years old, but worse still, his daughter to boot.

19. The appellant as a father, abused the trust bestowed upon him by society, instead of protecting the complainant he turned out to be her tormentor as described by the prosecutor. He betrayed her trust and committed a heinous crime which occasioned severe trauma and suffering to the complainant. Indeed, he scarred her for life. I am aware of the sentencing policy guidelines, and part of the rationale in sentencing includes **Deterrence-** Prevent crime and reduce crime rate-based on the notion that everyone understands that certain conduct constitutes a crime which carries a severe penalty, and that because of this the public will desist from the targeted conduct. The nature of the offence, the age of the victim and her relationship with the appellant, all militate against any interference with the sentence meted out by the trial court. I am satisfied that the Appellant deserves to be kept away from society for long but to give a definite period I set aside life and substitute with 30 years imprisonment from date of conviction.

DELIVERED AND DATED THIS 17TH DAY OF MARCH 2021

H. A. OMONDI

JUDGE